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No. 91-1882

In The

Supreme Court of the United States

October Term, 1991

STANLEY STEWART,

Petitioner,

versus

PARISH OF JEFFERSON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF HAROLD PETE AND HAROLD SCHOMAKER OPPOSING STANLEY J. STEWART'S PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court, as affirmed by the United States Court of Appeals for the Fifth Circuit following its *de novo* review of the entire record in this case, properly granted

a. defendant Pete's motion to dismiss on grounds of one-year prescription, in light of petitioner's admissions that (i) one-year prescription is applicable, (ii) petitioner knew or should have known since November 1987 that Pete was harassing him, and (iii) he had no conversation or other contact with Pete between March 30, 1988 and December 15, 1989, the date of judicial demand; and

b. defendant Schomaker's motion for summary judgment dismissing petitioner's claims of violation of his rights under the First Amendment and under 42 USC §1983, because petitioner's speech and other conduct did not address matters of public concern but rather addressed petitioner's personal employment conditions.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

A. Respondent Pete 1

B. Respondent Schomaker 1

COUNTER-STATEMENT OF THE CASE 2

A. Petitioner's Speech Did Not Address Matters of Public Concern 3

B. Case Not Appropriate for Supreme Court Review 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Connick v. Myers, 461 U.S. 138 (1983) 3, 4, 6

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1979) 3

Page v. DeLaune, 837 F.2d 233 (5th Cir. 1988) 3

Rankin v. McPherson, 483 U.S. 378 (1987) 4

Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. den.*, 479 U.S. 1064 (1987) 4

Statute

42 U.S.C. §1983 3

INTRODUCTION

A. Respondent Pete.

Pete, who was Petitioner's first-tier supervisor, retired from his employment with Jefferson Parish in June 1988. Suit was filed December 15, 1989. Petitioner admits that the applicable prescription period is one year. Although Petitioner seeks reinstatement of his claims against Pete, he has put forth no grounds therefor in his Petition for Writ of Certiorari. Moreover, the lower courts'[1] finding that petitioner's claims against Pete have prescribed is amply supported. Accordingly, Pete will not burden this Court with further argument.

B. Respondent Schomaker.

The decisions below, unanimously made by all four judges who considered the claim, were clearly correct. The lower courts dismissed petitioner's complaint on the grounds that the content of his speech concerned his having been personally abused because of his friendship with Breaud rather than his alleged championship of Breaud's Constitutional and statutory rights not to be sexually harassed in the workplace. The facts in this case disclose a "soured personal relationship"[2] between Pete and Breaud, and petitioner's desire that Pete not draw him (petitioner) into that personal dispute. Further, it is

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[1] The district and appeals courts' judgments of dismissal were unanimously subscribed to by all four judges who considered the case in the lower courts.

[2] See Opinion of the Court of Appeals, reprinted in the instant Petition, p. A-5.

undisputed that Schomaker never engaged in any sexual harassment of Breaud or anyone else, and that more than 19 months elapsed between Pete's final conversation with petitioner and/or Breaud, and the date suit was filed.

COUNTER-STATEMENT OF THE CASE

The District Court accurately and dispassionately set forth the facts as follows:

> "Plaintiff, Stanley Stewart, and Joyce Breaud were Engineer Inspectors II with Jefferson Parish Street Department in the Department of Public Works. Their immediate supervisor was Harold Pete. Pete's supervisor was Harold Schomaker. In early 1988, Stewart and Breaud complained to Schomaker that Pete was sexually and verbally harassing Breaud and verbally harassing Stewart because of Stewart's friendship with Breaud. In March, 1988, Stewart made the same complaints to William Lavelle, Schomaker's supervisor in the Department of Public Works. That same month Stewart began reporting to a supervisor other than Pete and two months later Breaud was transferred to a different office. In December, 1988, Stewart was assigned to the drainage inspection team. When he refused to enter the drains, Stewart was reassigned to the sign department as Sign Technician I where he remained until he resigned in August 1989."[3]

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[3] Neither of the courts below found it necessary to reach defendants' contention that Stewart's evidence did not

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A. Petitioner's Speech Did Not Address Matters of Public Concern.

> "Initially . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' – or, to put it in other words, that it was a 'motivating factor' in the [employer's] decision . . . " *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977).

The courts below both held that in order to survive a motion for summary judgment a public employee who claims under the First Amendment and/or 42 USC §1983 must establish at the outset that his speech addressed matters of public concern. *Page v. DeLaune,* 837 F.2d 233 (5th Cir. 1988). In making this determination, the courts below applied the criterion set forth in *Connick v. Myers,* 461 U.S. 138 (1983), namely, examination on a case-by-case basis of content, context and form of the utterances. 461 U.S. at 147-48. The standard is whether petitioner's statements address a matter of public concern. If not, as the courts below found, the statements are not protected. If the statements are not protected, there need be no further inquiry. *Connick v. Myers,* above.

As the Fifth Circuit stated in the instant case, the inquiry as to whether speech is protected is a question of

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establish a genuine issue of fact that his complaints of November 1987 through March 1988 triggered his assignment in December 1988 to the drainage inspection team.

law – not fact. *Rankin v. McPherson,* 483 U.S. 378, 386 n.9 (1987); *Connick v. Myers,* 461 U.S. at 148 n.7.

Moreover, the fact that the statements were of arguable public interest does not clothe them with protected status. "[A]lmost anything that occurs within a public agency could be of concern to the public . . . " *Terrell v. University of Texas System Police,* 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. den.,* 479 U.S. 1064 (1987). However, as the courts below held, this truism does not translate into a doctrine that when speech deals with individual personal disputes and grievances, it becomes protected because of some tinge of public concern. As noted above, the question is whether the speech deals primarily with individual grievances, not whether in addition there might possibly be a spillover into matters of concern to the public.

There is no merit to Stewart's claim that his failure to respond to Pete's curiosity regarding Breaud's whereabouts touched upon a matter of public concern. The purpose of Stewart's complaints to Schomaker and Lavelle was to convince those officials to order Pete to stop bothering Stewart. Pete's questions were upsetting to Stewart and raised his personal anxiety level.

Thus, Stewart asserted during his deposition that Pete "always threatened me of losing my job and being demoted" (Stewart dep. p. 239, R. 555); that he told Lavelle, "[a]ll I wanted was him [Pete] to leave me alone," and that although he was fully aware that it was illegal for a supervisor to engage in sexual harassment of an employee when he talked with Lavelle in March 1988, his objective was purely personal; thus, Stewart testified,

"you see, I wasn't worried about that. All I wanted was him to leave me alone. I didn't want no part of all of that. . . . I just feel like, I wasn't attacking him [Pete] because of that. All I wanted [was] to be left alone and live a normal life . . . I didn't want to be harassed – because of what she [Breaud] wanted . . . I don't feel like any person should work under that environment." (Stewart dep. pp. 235-36, R. 551-52).

All of Stewart's statements were designed to ease the claimed pressures on himself which resulted from his friendship with Breaud. At best he was complaining to Schomaker about Pete's harassing Breaud because Pete's questions made Stewart personally uncomfortable. At no time was Stewart expressing any interest or view regarding Parish policy on sexual harassment, nor was he protesting sexual harassment of employees. If he protested Pete's sexual harassment of Breaud it was because Pete was making him uncomfortable, not because he was championing the rights of Parish employees to be free from sexual abuse. All of Stewart's activity was purely personal.

Finally, petitioner's efforts to clothe his activities with the trappings of public concern do not make it so. Thus, no matter how many times petitioner repeats that he functioned as a "witness" for Breaud this does not make it so. Petitioner's complaints about Pete's conduct made to Schomaker, Rupp and Lavelle were all designed to get Pete "to leave me alone." (Stewart dep. pp. 235-36, R. 551-52). Petitioner's effort was successful.

All of petitioner's alleged causes of action concern matters similar to the internal policies of the district attorney's office which this Court held were not of public concern in *Connick v. Myers*, 461 U.S. 138 (1983), the leading case on the subject. As Judge Wicker held, Stewart's statements are more analogous to individual personal disputes than to matters of public concern.

B. Case Not Appropriate For Supreme Court Review

Supreme Court Rule 10 sets forth the criteria to be met in order to support grant of a writ of certiorari. There should be a showing of important and special reasons. The instant application fails to meet the stated criteria. Moreover, contrary to petitioner's contention, the application does not disclose conflict among the circuits, conflict with any state court or departure from prior decisions. Petitioner's brief shows only that he is not satisfied with the results below. It is respectfully submitted that unhappiness with the outcome of litigation is not a sufficient basis for invocation of the Supreme Court's self-limiting exercise of its discretionary jurisdiction.

CONCLUSION

There is no rational basis on which to grant petitioner's application for writ of certiorari. The petition should be denied.

June 17, 1992.

Respectfully submitted,

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